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No. _____

# In the Supreme Court of the United States

BRIAN T. THOMAS,

*Petitioner,*

v.

JAMES E. DOYLE, JAMES L. SCHANSBERG, KEITH CRIVELLO, DIANE NELSON, AND CHERYL R. SCHINDLER,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the adequate and independent state ground and procedural default doctrines applicable to federal habeas petitioners can be applied to 42 U.S.C. § 1983 civil rights suits under the Prison Litigation Reform Act.

2. Whether this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), eliminated the distinction between the doctrines of procedural default and failure to exhaust.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that because he is an individual, there are no corporate disclosures to be made.

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# PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is unreported, as is the decision of the court appeals denying rehearing (App., *infra*, 6a). The opinion of the district court (App., *infra*, 7a-24a) is unreported.

## JURISDICTION

The court of appeals' judgment was entered on May 2, 2002. A timely petition for rehearing en banc was denied on July 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, provides in relevant part: "No action shall be brought with respect to prison conditions under section 1983 of this title or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

## STATEMENT

This case arises from an inmate's civil rights suit under 42 U.S.C. § 1983, over which the district court had jurisdiction under 28 U.S.C. §§ 1343 and 1331. The Seventh Circuit ruled that a failure to comply with a time limit applicable to prison administrative grievance procedures constituted a procedural default of the § 1983 claim, and that this procedural default in turn constituted a failure to exhaust for the purposes of the PLRA. The significance of these holdings is best understood in light of the statutory regimes governing prisoner litigation.

**1. The Legal Framework**

Inmate suits in federal court generally fall into one of two categories: petitions for writs of habeas corpus, which challenge the fact or duration of a prisoner's confinement, and claims under 42 U.S.C. § 1983, which allege violations of federal constitutional or statutory rights under color of state law. Habeas petitions are subject to the requirements of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Among other provisions, AEDPA requires prisoners to exhaust available state remedies before seeking federal habeas corpus relief. See 28 U.S.C. § 2254(b)(1)(A). A habeas petition filed after exhaustion of state remedies effectively seeks review of the decision of the last state court to hear the petitioner's claim, see *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991), and 28 U.S.C. § 2254(d) and (e) instruct federal courts to defer to the legal and factual determinations of such state courts. Because a writ of habeas corpus will issue only to remedy a violation of federal law, a state court decision resting on an adequate and independent state ground — either substantive or procedural — will generally defeat a federal habeas challenge. See, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991).

One facet of the adequate and independent state ground rule is the procedural default doctrine, which the Seventh Circuit claimed to apply to Thomas's § 1983 suit. See, *e.g.*, *Trest v. Cain*, 522 U.S. 87, 89 (1997) ("procedural default is typically an instance" of "the independent and adequate state ground doctrine") (internal quotation marks omitted); *Harris v. Reed*, 489 U.S. 255, 260 (1989) ("the procedural default rule * * * has its historical and theoretical basis in the 'adequate and independent state ground' doctrine"). Under the procedural default doctrine, a claim that has been rejected by a state court on procedural grounds, or that has not been presented to a state court but is clearly barred under state procedural law, is considered both exhausted and procedurally defaulted. See,

*e.g.*, *Stewart v. Smith*, 122 S. Ct. 2578, 2581 (2002) (holding that petitioner whose claim had been rejected by state court on waiver grounds had committed a "procedural default") (per curiam); *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (exhaustion requirement "is satisfied if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law") (alterations in original).

With few exceptions, such as the adequacy requirement and the cause and prejudice exception, a federal habeas court will not hear a procedurally defaulted claim. See, *e.g.*, *Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 880 (2002) (finding state procedural rule inadequate to bar habeas review); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (discussing cause and prejudice exception). For claims rejected by state courts, this is a straightforward appplication of the adequate and independent state ground rule. For those not presented to state courts, the procedural default rule effectively hypothesizes a state court decision rejecting the claim on procedural grounds and recognizes the adequate and independent state ground upon which such a decision would rest. See *Gray*, 518 U.S. at 162 ("the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review [absent exceptions]").

Section 1983 claims, by contrast, do not seek review of any state proceeding. Nor does any statute instruct federal courts to defer to the findings or legal conclusions of prison administrators. There is, consequently, no room under § 1983 for application of the adequate and independent state ground doctrine in general, or for procedural default in particular. And until relatively recently, inmate § 1983 claims were not subject to a uniform exhaustion requirement. The pre-PLRA Civil Rights of Institutionalized Persons Act allowed, but did not require, courts to demand exhaustion in some § 1983 suits

brought by adult inmates. See *Patsy v. Board of Regents*, 457 U.S. 496, 510-513 (1982). In *Patsy*, this Court declined to impose a general exhaustion requirement on § 1983 claimants, reasoning that such an approach would raise questions — including how to treat a claimant who had failed to meet the procedural requirements of the grievance process — better left to Congress. *Id.* at 514; see also *McCarthy v. Madigan*, 503 U.S. 140 (1992) (declining to impose exhaustion requirement on federal inmates' *Bivens* claims).

In 1996, Congress enacted the PLRA. Among other things, the PLRA abrogated *McCarthy* by providing that prisoners could not bring suit under any federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); see also *Booth v. Churner*, 532 U.S. 731, 740-741 (2001) (discussing § 1997e(a) and *McCarthy*). Congress did not, however, enact any provisions to answer the question flagged by *Patsy*: what would be the consequence of a procedural error in the course of exhaustion. The Seventh Circuit, breaking from every other federal court of appeals, held that this Court answered that question in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). The Seventh Circuit's decision is a glaring misinterpretation whose far-reaching implications demand this Court's attention.

**2. Thomas's Case**

Brian Thomas is an African American, H.I.V.-positive inmate at Waupun Correctional Institution in Waupun, Wisconsin. In April of 1997, prison officials questioned Thomas about an allegation that he and another inmate had engaged in sexual conduct while showering. Thomas denied that any sexual contact had taken place. Prison officials then placed Thomas in solitary confinement. The other inmate, who is white and H.I.V.-negative, was placed in a more lenient form of temporary detention, which allowed him to receive visitors,

make personal telephone calls, smoke and have access to the canteen. Thomas was allowed none of these privileges.

Later that month, prison officials conducted a disciplinary hearing regarding the alleged incident. Thomas was not allowed to present documentary evidence or cross-examine the witnesses against him. The hearing committee rejected Thomas's claims of discriminatory treatment, found him guilty of sexual misconduct, and imposed a punishment of three days adjustment segregation, 90 days program segregation, and dismissal from his job as a food service worker. Thomas appealed the decision to the warden, who affirmed the hearing committee's decision, stating that it was "correct," that the "evidence supports findings," and that there were "[n]o technical errors." *Thomas v. McCaughtry*, 201 F.3d 995, 998 (7th Cir. 2000). The warden did, however, remand for a statement of reasons, which the committee then provided. *Ibid.* Unaware that prison regulations entitled him to appeal a decision that had been affirmed and remanded, Thomas did not file an appeal.

Instead, Thomas pursued a state-court certiorari remedy, seeking to restore the good-time credits he lost as a result of placement in segregation. *Ibid.* That suit was dismissed for failure to exhaust administrative remedies, as was Thomas's subsequent attempt to obtain the same relief via a federal habeas petition. *Id.* at 998-999. In June 2000, Thomas filed a § 1983 complaint for damages in federal court alleging, among other things, that the harsher treatment he received during the disciplinary investigation was based on his race and H.I.V.-positive status, in violation of the Fourteenth Amendment's Equal Protection Clause and the Americans with Disabilities Act. The district court issued a memorandum advising Thomas of administrative remedy exhaustion requirements under the PLRA. Thomas then requested a voluntary dismissal to allow

him to exhaust his administrative remedies. The district court granted the request.

On January 11, 2001, Thomas filed papers in district court indicating that he had exhausted his administrative remedies by appealing the hearing committee's statement of reasons and that his appeal had been denied as untimely. He also filed a motion seeking to reinvigorate his prior complaint. The court noted that Thomas would have to initiate a new suit, but it permitted Thomas to use the earlier-filed pleadings for his new complaint. On February 22, 2001, the district court dismissed the complaint *sua sponte* for failure to state a claim. App., *infra*, at 7a-21a.

Thomas appealed the dismissal to the Seventh Circuit. The appellees conceded that the district court's dismissal for failure to state a claim was erroneous, but argued that the dismissal should be affirmed on the alternate ground that Thomas, by filing an untimely appeal of the hearing committee's statement of reasons, had failed to exhaust his administrative remedies. Thomas fully briefed the issue, arguing that nothing in the PLRA distinguished between the rejection of a grievance on procedural grounds and a merits-based rejection, and that habeas doctrines such as procedural default were unique to collateral review and could not be applied to § 1983 suits. The Seventh Circuit scheduled oral argument for April 24, 2002.

### 3. The *Pozo* Decision

Six days before oral argument was to be held in Thomas's case, the Seventh Circuit decided *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002). Like Thomas, Pozo brought a § 1983 suit against prison officials after exhausting his administrative remedies. And like Thomas, Pozo missed a filing deadline at one stage in the prison grievance procedure. The district court in *Pozo* held that a prisoner whose grievance has been rejected on procedural grounds has exhausted his

administrative remedies under the PLRA. The Seventh Circuit reversed this decision. Relying on *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the court held that Pozo's untimely appeal of his administrative grievance meant that he had failed to exhaust administrative remedies and was therefore barred from filing a § 1983 complaint. See *Pozo*, 286 F.3d at 1023-1025.

The Seventh Circuit arrived at its decision by explaining that the "old understanding" of exhaustion for collateral attacks — *i.e.*, that "a prisoner exhausts state judicial remedies by using whatever is available at the moment; if no remedies are left, then the challenge may proceed in federal court" — had been "jettisoned by *O'Sullivan v. Boerckel*" and replaced by a new understanding, under which "procedural default also means failure to exhaust one's remedies." *Id.* at 1024. The Seventh Circuit went on to observe without discussion that the parties "have agreed" that the new understanding applies to exhaustion under § 1997e(a).

*Pozo* thus contains two distinct holdings. First, with no identified support, it holds that the habeas doctrine of procedural default applies to inmate civil right suits under the PLRA. Second, *Pozo* holds that *Boerckel* transformed the procedural default doctrine, creating a new regime under which procedural default also constitutes a failure to exhaust. The first of these holdings goes well beyond the text of the PLRA and deepens a serious circuit split. The second diverges from every other federal circuit and defies this Court.

**4. The *Thomas* Decision**

Relying on *Pozo*, the Seventh Circuit affirmed the dismissal of Thomas's claim because the prison administrators had rejected his appeal on timeliness grounds. App., *infra*, at 4a-5a. Under *Pozo*, the panel reasoned, a decision on procedural grounds established a failure to exhaust, making dismissal mandatory under the PLRA. *Ibid.* Because dismissal was

mandatory, Thomas was not afforded the opportunity to explore on remand the reasons and possible excuses for his failure to file a timely appeal.

## REASONS FOR GRANTING THE PETITION

Certiorari review is appropriate because this case presents two important questions about exhaustion and procedural default under AEDPA and the PLRA. On the first question, the Seventh Circuit has adopted a minority position and deepened a circuit split; on the second, it has set itself against every other federal court of appeals and the binding precedent of this Court itself. Only this Court can resolve the uncertainty thus created and restore uniformity to the law.

The first question concerns whether, under the PLRA, the adequate and independent state ground and procedural default doctrines applicable to federal habeas petitions also govern § 1983 suits. By answering that question in the affirmative, the Seventh Circuit has detached the procedural default doctrine from its conceptual base and gone well beyond the text of the PLRA. One circuit seems to have come to a similar conclusion, but seven have rejected it.

The second question concerns the contours of the procedural default doctrine — specifically, whether *Boerckel* rejected the well-established rule that a procedurally defaulted claim is exhausted. See, *e.g.*, *Gray*, 518 U.S. at 161 (exhaustion requirement "is satisfied if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law") (alterations in original). The Seventh Circuit concluded that *Boerckel* dramatically changed the law, jettisoning the old understanding and holding that a procedurally defaulted claim is now to be considered *un*exhausted. See *Pozo*, 286 F.3d at 1024 ("[a]fter *Boerckel*, a

procedural default also means failure to exhaust"). The necessary implication of this holding is that a § 1983 claimant who has committed a procedural error will see his suit dismissed for failure to exhaust, regardless of the adequacy of the state procedural rule producing the default, or the petitioner's ability to demonstrate cause and prejudice, since these excuses pertain to procedural default rather than exhaustion. See, *e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) ("a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims"). This holding departs from every federal circuit and is squarely contradicted by this Court's recent decisions.

Thomas's case presents an ideal vehicle for consideration of both issues. Because Pozo did not contest either the Seventh Circuit's interpretation of *Boerckel* or its application of the adequate and independent state ground doctrine to a § 1983 suit, his case would not make as good a vehicle for certioriari review of those issues.[1] By contrast, Thomas fully briefed the issues and further argued them in a petition for rehearing en banc. Moreover, the split in the circuits over both issues is sufficiently mature to warrant this Court's consideration. Finally, because appellees conceded at oral argument that the

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[1] Pozo filed a petition for certiorari on August 8, 2002. See 71 U.S.L.W. 3137 (Aug. 8, 2002) (No. 02-204). His petition argues that the Seventh Circuit erred in its application of the procedural default doctrine by refusing to allow him to demonstrate cause and prejudice, and by incorrectly enforcing a bar based on a procedural rule that Wisconsin officials had discretion to waive and did not consistently enforce. Thomas supports both those claims, but he challenges aspects of the Seventh Circuit's reasoning that are logically prior and more fundamental — *i.e.*, whether the habeas procedural default rule should apply to § 1983 suits in the first place. If this Court grants either petition, Thomas respectfully suggests that it would be appropriate to hold the other.

district court's dismissal for failure to state a claim was erroneous, reversal of the Seventh Circuit's exhaustion ruling will have an immediate and practical effect on this litigation, allowing Thomas's § 1983 suit to proceed.

## I. The Seventh Circuit's Application Of Habeas Doctrines To A § 1983 Suit Deepens A Circuit Split And Is Incorrect

The Seventh Circuit's ruling that habeas procedural default doctrines govern § 1983 suits demands this Court's attention. No other circuit has applied *Boerckel* to a § 1983 suit. And no other circuit has held that a §1983 claim can be procedurally defaulted by an inmate's errors in an administrative grievance proceeding, let alone render that claim unexhausted by reason of such a procedural default. The PLRA simply makes no mention of procedural default. As the Fifth and Ninth Circuits have recognized, the "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach" one by a statutory reference to the other. *Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) (citing *Jackson v. Johnson*, 194 F.3d 641, 652 n.35 (5th Cir. 1999)).

On the precise question presented by this case, the effect of an inmate's procedural error in the course of exhausting administrative remedies, the Seventh Circuit is on the short side of what appears to be a 7-2 circuit split. Although it appeals neither to *Boerckel* nor to the doctrine of procedural default, the Third Circuit seems to have joined the Seventh Circuit in holding that an inmate's untimely exhaustion is no exhaustion at all under the PLRA, and therefore that the inmate's § 1983 claim must be dismissed. See *Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002) (a late administrative appeal does not

constitute "substantial compliance" with the exhaustion requirement).[2]

By contrast, a substantial majority of circuits have held that dismissals of § 1983 suits for failure to exhaust *must* be without prejudice, and that inmates may file suit after pursuing untimely grievances. The Second Circuit has more than once reversed district courts that dismissed such claims with prejudice. See *Morales v. Mackalm*, 278 F.3d 126, 131 (2d Cir. 2002) ("Failure to exhaust administrative remedies precludes only the current lawsuit"); *De La Motte v. Menifee*, 40 Fed. Appx. 639 (2d Cir. 2002) (unpublished) (reversing district court that had relied on the fact that "[r]ecourse to the administrative remedies [is] now time barred" to dismiss with prejudice) (alterations in original).

The Fifth Circuit has likewise stated explicitly that an inmate whose grievance is time-barred may return to court after exhaustion. In *Wendell v. Asher*, 162 F.3d 887, 889 (5th Cir. 1998), the court considered Due Process claims relating to a disciplinary hearing conducted on June 27, 1997. The court noted that state prison procedures allowed inmates fifteen calendar days to file a grievance, but that the inmate "ha[d] never pursued administrative remedies at all." *Id.* at 891. The court issued its decision on December 24, 1998, by which point the time limit had obviously long since run on the inmate's administrative grievance. It nonetheless held that exhaustion

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[2] The *Ahmed* plaintiff filed suit under § 1983 before making his untimely administrative appeal, and the Third Circuit also faulted him for "the filing of a suit before administrative exhaustion, however late, has been completed." 297 F.3d at 209. This language — like the court's decision to dismiss without prejudice — suggests that a late appeal can complete exhaustion. Hence it may be that the *Ahmed* plaintiff's only defect was initiating suit before the untimely appeal had been rejected, which would align the Third Circuit with the majority and make the split 8-1.

was still possible, that the dismissal "will not * * * render judicial relief unavailable" and that "there are no apparent barriers to the refiling of this action in federal district court once [plaintiff] exhausts his administrative remedies." *Id.* at 892; see also *Wright v. Hollingsworth*, 260 F.3d 357 (5th Cir. 2001) (modifying district court judgment to reflect dismissal without prejudice).

The Sixth Circuit, while noting correctly that an inmate cannot simply refuse to file a grievance and then claim that no remedies are available,[3] has likewise dismissed without

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[3] Thomas does not claim that an inmate can exhaust remedies by doing nothing and then arguing that they are time-barred and no longer available. Prison administrators can hear untimely appeals, and inmates must therefore file them, as Thomas did, whether or not the time limit has run. Rather, Thomas submits only that rejection of a grievance on timeliness or other non-merits grounds does not bar a § 1983 suit. That is, because a § 1983 suit does not seek to overturn a state proceeding, the fact that the proceeding was decided on state-law grounds is irrelevant to the § 1983 suit. This argument is supported by the general practice of dismissing § 1983 suits without prejudice in circumstances in which administrative remedies are clearly time-barred, with the expectation that the inmate will return to federal court after exhaustion. Requiring inmates to file untimely grievances might seem an empty formality in any individual case, but the requirement eliminates the possibility of exhaustion by inaction, and with that possibility gone, inmates have no incentive not to make a timely filing. (Unlike a habeas petitioner, an inmate bringing a § 1983 suit faces no possible repercussions in federal court from administrative decisions rejecting his claims on the merits.) This approach preserves the efficacy of the exhaustion requirement without imposing undue punishment for procedural mistakes made in the course of good-faith attempts at exhaustion. Because prison grievance systems oftentimes grant administrators the option to consider untimely claims or appeals on the merits, requiring untimely filing as a prerequisite to suit also promotes one of the goals of the

prejudice the claims of an inmate who had failed to appeal the denial of a grievance, despite the fact that the failure lay more than three years in the past. See *Hartsfield v. Vidor*, 199 F.3d 305, 308-309 (6th Cir. 1999).

Taking similar positions are the Eighth, Tenth, and D.C. Circuits. In *Walker v. Maschner*, 270 F.3d 573, 575-577 (8th Cir. 2001), the court noted that the plaintiff, who faced a seven-day limitations period for appealing the denial of his grievance, did not do so; that he "concede[d] that he failed to exhaust his available administrative remedies"; but that he "may file a claim in federal court once he has fully exhausted his prison remedies." The Tenth Circuit likewise held that exhaustion is possible for a plaintiff whose claim was based on an incident five years in the past, and hence undoubtedly time-barred under prison administrative requirements. See *Lowe v. Sockey*, 36 Fed. Appx. 353 (10th Cir. 2002) (unpublished); see also *Jernigan v. Stuchell*, 2002 WL 31058282 (10th Cir.) (dismissing without prejudice, adopting Fifth Circuit's position in *Wright v. Hollingsworth*, *supra*). The D.C. Circuit, in *Jackson v. District of Columbia*, 254 F.3d 262, 268 (D.C. Cir. 2001), considered the § 1983 class-action suit of an inmate who had never filed the "Level I formal grievance" that prison procedures required to be filed within thirty days of the occurrence. The D.C. Circuit held that the district court "should have dismissed the complaint without prejudice, allowing the prisoners to refile once they have completed the [prison] grievance procedures," *id.* at 270-271, again plainly supposing that the expiration of the filing deadline was no bar to exhaustion. Indeed, the *Jackson* plaintiffs went on to exhaust their administrative remedies, return to court, and prevail on the

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exhaustion requirement, allowing administrators to respond to complaints they deem meritorious.

merits. See *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23 (D.D.C. 2002).

The Eleventh Circuit's position is slightly more difficult to ascertain. In *Harper v. Jenkin*, 179 F.3d 1311 (11th Cir. 1999), it held that an inmate whose grievance had been denied as untimely could not file suit before appealing the denial and seeking leave to file an untimely grievance. *Harper* does clearly hold that administrative remedies cannot be exhausted by simple neglect, and *Pozo* read *Harper* to also hold that untimely exhaustion does not constitute exhaustion. See *Pozo*, 286 F.3d at 1024 (citing *Harper*). Although *Harper* does contain some suggestive language, its actual holding is that the failure to appeal and seek leave to file an untimely grievance meant that remedies were still available and hence unexhausted. The court did *not* hold that the § 1983 suit was procedurally barred—which is what the Seventh Circuit would do in such a case. Indeed, by affirming a dismissal *without* prejudice, it evidently assumed that once the inmate appealed (and presumably had his appeal denied on timeliness grounds) he would be able to pursue his § 1983 claim in federal court. Consequently, the Eleventh Circuit seems to belong with the majority on this issue.

The Seventh Circuit is not only in the minority; it is wrong. The theory on which it relies—that the non-merits rejection of an attempt to exhaust state remedies means that no exhaustion has occurred—is not only a gross misreading of *Boerckel*; it is also a serious misunderstanding of the relationship between procedural default and exhaustion.

This Court's cases make clear that procedural default cannot be applied to § 1983 suits because they are not attacks on state-court proceedings. "[P]rocedural default is typically an instance" of "the independent and adequate state ground doctrine." *Trest*, 522 U.S. at 89. The adequate and independent

state ground doctrine operates to shield state-court decisions from direct Supreme Court review or federal collateral attack, recognizing that a habeas petition asks a federal court to "overturn[] a state court conviction." *Boerckel*, 526 U.S. at 845; see also *Coleman*, 501 U.S. at 730 ("a state prisoner is in custody *pursuant* to a judgment" which a federal court effectively sets aside by granting habeas relief) (emphasis in original). A § 1983 suit, by contrast, is not attacking a state judicial decision, or even a state administrative proceeding. It is entirely independent of state proceedings, and with no state proceeding to shield, neither the adequate and independent state ground doctrine nor the procedural default rule can apply. As this Court has held in explaining the relation between procedural default and the adequate and independent state ground, "[o]nce the lineage of the rule is clarified, the cure for the confusion becomes apparent." *Harris*, 489 U.S. at 260. Procedural default relates to review of state proceedings and cannot be applied to a § 1983 suit.

## II. The Seventh Circuit's Interpretation Of *Boerckel* Splits From Every Other Circuit and Defies This Court

Even if the PLRA imposed habeas procedural default doctrine upon § 1983 suits, the Seventh Circuit's interpretation of *Boerckel* departs so far from that of this Court and the other federal circuits that certiorari review still would be appropriate. Without even quoting any of this Court's language in support of its assertion, the Seventh Circuit announced that *Boerckel* "jettisoned" the old understanding of exhaustion and held that procedural default now also constitutes failure to exhaust.

This interpretation of *Boerckel* places the Seventh Circuit in conflict with every other federal court of appeals, all of which treat procedurally defaulted claims as exhausted, and nine of which have reaffirmed this rule after *Boerckel*. See,

*e.g.*, *Townsend v. Commissioner*, 23 F.3d 395 (1st Cir. 1994) (unpublished) ("Petitioner's failure to appeal the denial of his state habeas petition to the New Hampshire Supreme Court constitutes a procedural default rather than a failure to exhaust"); *Aparicio v. Artuz*, 269 F.3d 78, 96 n.9 (2d Cir. 2001) (claims "could be deemed exhausted through [petitioner's] procedural default"); *Wenger v. Frank*, 266 F.3d 218, 223 (3d Cir. 2001) (discussing *Boerckel*, states that "[i]f a claim has not been fairly presented to the state courts but further state-court review is clearly foreclosed under state law, * * * the claim is procedurally defaulted, not unexhausted"), cert. denied, 112 S. Ct. 1364 (2002); *Baker v. Corcoran*, 220 F.3d 276, 288 (4th Cir. 2000) ("A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court"), cert. denied, 531 U.S. 1193 (2001); *Evans v. Cockrell*, 285 F.3d 370, 375 (5th Cir. 2002) ("it is well established that a claim is exhausted" if it is procedurally barred); *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001) ("If no remedy exists * * * no exhaustion problem exists"), cert. denied, 112 S. Ct. 1106 (2002); *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) ("If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default"); *Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) ("If a prisoner failed to present his claims in state court and can no longer raise them through any state procedure, state remedies are no longer available, and are thus exhausted"); *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000) (claims not presented to state courts and procedurally barred "are considered exhausted and procedurally defaulted"); *Smith v. Jones*, 256 F.3d 1135, 1139 (11th Cir. 2001) (noting that *Boerckel* holds that failure to exhaust "matured into a procedural default as soon as the once available remedy was

closed"), cert. denied, 112 S. Ct. 1081 (2002); *United States v. Stewart*, 246 F.3d 728, 729 (D.C. Cir. 2001) (failure to present claim results in procedural default, which can be excused by showing of cause and prejudice or actual innocence).

On this issue, the Seventh Circuit is on the short end of an 11-1 split. It is also plainly wrong. *Boerckel* expressly distinguished between the questions of "whether a prisoner has exhausted his state remedies" (exhaustion) and "whether he has *properly* exhausted those remedies" (procedural default). 526 U.S. at 848 (emphasis in original). *Boerckel* held that a prisoner who failed to present his claims to the state's highest court via a petition for discretionary review had "procedurally defaulted his claims." *Ibid.* Nothing in the opinion suggests an intent to obliterate the distinction between procedural default and failure to exhaust.

Indeed, this Court itself, discussing *Boerckel*, has stated that "a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it * * * would have 'concededly exhausted his state remedies.'" *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (quoting *Boerckel*, 526 U.S. at 854 (Stevens, J., dissenting)) (emphasis in original).[4] *Edwards* does not precisely describe Thomas's circumstances, for the prison administrators did, under the Wisconsin grievance system, have the ability to hear Thomas's untimely

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[4] See also *id.* at 850 (Stevens J., dissenting) ("the question presented by this case is not whether respondent's claims were exhausted; they clearly were because no state remedy was available to him when he applied for the federal writ. The question is whether we should hold that his claims are procedurally defaulted"); *id.* at 848 ("We do not disagree with Justice Stevens' general description of the law of exhaustion and procedural default. Specifically, we do not disagree with this doctrine").

appeal. See Wis. Admin. Code § DOC 310.13(3) (corrections complaint examiner may hear appeals filed more than five days after receipt of decision). *Edwards* does, however, make clear that the Seventh Circuit has disregarded this Court's binding precedent, for it squarely states that a petitioner whose claim has been rejected on procedural grounds has exhausted his state remedies.

## III. The Issues Presented Are Of Great Importance

The Seventh Circuit's first holding, that the procedural default doctrine from federal habeas law can be applied to a § 1983 suit, works an astounding change in inmate civil rights litigation. Coupled with the second holding, that procedural default ipso facto constitutes a failure to exhaust, the Seventh Circuit erected a devastating barrier to prisoners' claims of constitutional violations.

This Court has recently resolved questions regarding the scope of the PLRA exhaustion requirement. See *Porter v. Nussle*, 534 U.S. 516 (2002) (exhaustion requirement applies to claims of excessive force); *Booth v. Churner*, 532 U.S. 731 (2001) (exhaustion requirement applies when grievance procedure cannot award relief sought in court). In each case, it held that the requirement is exceedingly broad, applying to claims for which the grievance process offers no remedy, and even to claims whose subject matter falls outside the scope of permissible grievances, so long as the possibility exists that administrators may "take some action in response to a complaint." *Booth*, 532 U.S. at 736.

By requiring exhaustion in all cases, these decisions increase the number of § 1983 claims potentially subject to the Seventh Circuit's rule, and therefore enhance the importance of the question whether the procedural default rule can be applied in § 1983 litigation. If the Seventh Circuit's decision is allowed to stand, many inmates will lose their chance at a federal

hearing for their claims of constitutional violations. Prison grievance proceedings typically have multiple layers of review and very short filing deadlines.[5] Prisoners are usually poorly-educated[6] and will almost certainly be uncounseled at the administrative grievance stage. Few of them can be expected to navigate a complicated and unforgiving administrative process without a procedural misstep. Thomas himself fell short by failing to appeal a decision that had been affirmed, a course of action that would occur to few lawyers.

The Seventh Circuit's rule pays no heed to the merits of the inmates' underlying claims. It operates more or less at random, barring constitutional claims as a result of nothing more than a pro se inmate's confusion or ignorance. That is a surprisingly harsh treatment of civil rights suits. As Justice Breyer recently stated, a rule that "would close the doors of federal * * * courts to many state prisoners and * * * would do so *randomly*" is not "consistent with our human rights tradition." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 268 (2002) (emphasis in original).

More troubling still, because the Seventh Circuit's rule is couched in terms of failure to exhaust, it is unaccompanied by any of the mitigating doctrines that protect a habeas petitioner from state procedural rules that are substantively unfair or arbitrarily applied. Neither the adequacy inquiry, see *Lee*, 122 S. Ct. at 888 (finding state procedural rule inadequate to bar

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[5] See, *e.g.*, John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 Brook. L. Rev. 429, 431 n.6 (2001) (citing three-day deadline to file and forty-eight-hour deadline to appeal).

[6] See, *e.g.*, Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement*, 86 Cornell L. Rev. 483, 530 n.221 (2001) (citing federal study finding "that seven out of every ten inmates perform at the lowest literacy levels").

habeas review), nor the cause and prejudice analysis, see *Edwards*, 529 U.S. at 451 (discussing cause and prejudice exception to procedural default), can excuse a failure to exhaust under the PLRA. See *Porter*, 122 S. Ct. at 988 (administrative remedies "need not meet federal standards, nor must they be 'plain, speedy, and effective'"). The Seventh Circuit has not only brought into § 1983 litigation a doctrine that has no place there; it has made the doctrine substantially harsher, granting prison administrators unfettered license to defeat § 1983 suits before they are filed by the simple expedient of creating and enforcing ever more complicated procedural constraints on administrative grievances. This Court should decide whether that was Congress' intent.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2002

# APPENDIX

United States Court of Appeals
Seventh Circuit.

Brian T. THOMAS, Plaintiff-Appellant,

v.

James E. DOYLE, et al., Defendants-Appellees.

No. 01-1773.

Argued April 24, 2002.
Decided May 2, 2002.

ORDER

Wisconsin prisoner Brian T. Thomas brought this action under 42 U.S.C. § 1983 raising equal protection and due process claims against prison officials after he was disciplined for washing another inmate's back while the two were showering. The district court screened the complaint under 28 U.S.C. § 1915A and dismissed it for failure to state a claim. We affirm, but for a different reason than that relied on by the district court.

## I. BACKGROUND

Thomas is housed at the Waupun Correctional Institution in Waupun, Wisconsin. In April 1997 prison officials gave Thomas a conduct report alleging that he had violated the prison's prohibition on "sexual conduct" by "washing another inmate's back with a soapy towel while both men were naked in the same shower stall." During the three-week investigation into these charges, Thomas and the other inmate, Timothy Harrison, were segregated from the general prison population in separate locations.

The prison disciplinary board held a hearing, and Thomas admitted washing Harrison's back. He claimed, however, that "there was nothing sexual intended." Harrison testified that Thomas never touched him. The board credited the statement of the guard who witnessed the incident and found Thomas guilty of engaging in sexual conduct. The board revoked 90 days' earned good- time credits and sentenced Thomas to three days' segregation.

After unsuccessfully pursuing federal habeas relief to regain the good-time credits, *see Thomas v. McCaughtry*, 201 F.3d 995 (7th Cir.2000), Thomas brought this § 1983 action. He alleged that during the investigation of the sexual conduct charges, prison officials violated his equal protection rights by treating him more harshly than Harrison. Thomas is an African American, bisexual male with the human immuno-deficiency virus ("HIV"), while Harrison is white, heterosexual and does not have HIV. Thomas alleged that prison officials treated him more harshly than Harrison because of his race, sexual orientation, and HIV status. Although both inmates were segregated from the general population during the disciplinary investigation, Thomas alleged that he was placed in solitary confinement (which he refers to as "the hole"), while Harrison was placed in "temporary lock-up," a setting Thomas claimed was less restrictive. According to Thomas, the temporary lock-up setting permitted Harrison to receive such privileges as telephone usage, visitation, access to his personal property, and the opportunity to leave his cell for exercise. Thomas claimed that he was denied these same privileges.

Thomas also alleged due process violations stemming from his disciplinary hearing, namely, that washing another inmate's back does not meet the technical definition of "sexual conduct," and that he was therefore wrongfully punished for conduct not proscribed by prison rules. He further alleged that he was

improperly denied the right to cross-examine his accuser, the guard who wrote the conduct report. He also alleged violations of Wisconsin law regulating prison disciplinary investigations and hearings.

Before the defendants were served, the district court screened Thomas's complaint under 28 U.S.C. § 1915a and dismissed it with prejudice for failure to state a claim. In analyzing Thomas's equal protection claims, the court found that the defendant's actions satisfied both the deferential rational basis test — applied to Thomas's sexual orientation and HIV status claims — as well as the more exacting strict scrutiny test — applied to Thomas's race claim. The court concluded that prison officials had a "legitimate interest in separating inmates from the general population during disciplinary investigations," and that equal protection was therefore satisfied. The court also rejected Thomas's due process claims, finding that the board had imposed a sanction of segregation, which did not implicate a protectible liberty interest. Because Thomas failed to raise a viable federal claim, the court declined to exercise jurisdiction over his state claims. Thomas filed a timely notice of appeal.

## II. ANALYSIS

Because this case reaches us on review of a dismissal for failure to state a claim, we view the facts in the record and inferences arising from those facts in the light most favorable to Thomas. *See Wynn v. Southward*, 251 F.3d 588, 591 (7th Cir.2001). We review *de novo* a dismissal under 28 U.S.C. § 1915A for failure to state a claim. *See id.; DeWalt v. Carter*, 224 F.3d 607, 611 (7th Cir. 2000); *Sanders v. Sheahan*, 198 F.3d 626, 626 (7th Cir.1999). Dismissal is appropriate only when no relief could be granted under any set of facts consistent with the complaint. *Wynn*, 251 F.3d at 592. Further,

allegations in a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. *Id.* at 591; *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

We do not reach the merits of Thomas's equal protection and due process arguments because his claims are procedurally barred. Just prior to oral argument, this court in *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002), determined that a prisoner's failure to take a timely administrative appeal within the state system means that he has failed to exhaust for purposes of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). Although the procedural history of this case is somewhat complex, it is apparent that Thomas filed an untimely grievance at one step in the process. The relevant facts are as follows: Thomas initially filed a timely appeal of the disciplinary board's decision, and the warden remanded for the board to address its reasoning in more detail. The warden nonetheless affirmed the board's decision in all other respects. *See Thomas*, 201 F.3d at 997. Thomas did not file an administrative appeal of the board's revised opinion, but instead filed an action for a common-law writ of certiorari in Wisconsin state court, which was denied. *Id.* at 999-1000. After unsuccessfully seeking federal habeas corpus relief, *see id.* at 1000, Thomas filed this § 1983 action. When the district court pointed out to Thomas that he needed first to exhaust his available administrative remedies, he voluntarily dismissed his complaint so that he could file a second appeal to the warden. When Thomas later filed a copy of this second appeal and the warden's denial, the district court reinstated the case.

Under *Pozo*, however, Thomas could not remedy his earlier failure to exhaust by filing an untimely grievance. In *Pozo*, this court held that a prisoner must file a timely grievance at each administrative level in order to satisfy the exhaustion

requirement of § 1997e(a). The court concluded that "a prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating." *Pozo*, at 1025. Any other approach would allow a prisoner to exhaust by "spurning" his administrative remedies, a result inconsistent with the purpose behind § 1997e(a). *Id.* at 1024. *Pozo* is dispositive here because it is apparent from Thomas's complaint that he did not file an appeal from the board's revised decision until nearly three years after the decision was issued — well past the deadline proscribed by Wisconsin law. Accordingly, he has not properly exhausted his administrative remedies under § 1997e(a).

AFFIRMED.

United States Court of Appeals
Seventh Circuit.

Brian T. THOMAS, Plaintiff-Appellant,

v.

James E. DOYLE, et al., Defendants-Appellees.

No. 01-1773.

July 18, 2002

ORDER

Appellant Brian Thomas Petition for Rehearing and Petition for Rehearing En Banc is DENIED. Judge Williams did not participate in the consideration of the petition for rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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| BRIAN T. THOMAS,<br><br>Petitioner,<br><br>V.<br><br>DEPARTMENT OF CORRECTIONS PRISON OFFICERS; ADMINISTRATION — CAPT. STRAHOTA, LT. RLOEHN, CAPT. R. HABLE; and GARY R. McCAUGHTRY, Warden at all relevant times,<br><br>Respondents. | ) | ORDER<br><br>01-C-38-C |

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, alleges that respondents violated his equal protection rights by discriminating against him on the basis of his sexual preference, H.I.V. positive status and race; his due process rights by holding him in adjustment confinement for 21 days without a hearing and by denying him the right to confront his accusers; the Americans with Disabilities Act by forcing him to quit his food service position; and state laws by not following proper disciplinary procedure. He seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's

proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See *Haines v. Kerner*, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997 e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999); see also *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d (7th Cir. 1999).

As an initial matter, I note that petitioner's filings in this case do not include a formal complaint setting out factual allegations in support of his claims. Instead, petitioner's submissions consist of a motion to "reinstate" case no. 00-C-368-C, a motion for appointment of counsel, several documents intended to show that petitioner exhausted his administrative remedies on claims set out in the pleading filed in case number 00-C-368-C and an up-to-date trust fund account statement. I understand petitioner to be requesting that he be allowed to file as the operative pleading in this case a copy of the pleading he

filed in June, 2000, in case number 00-C-368-C. The request will be granted.

When he filed case no. 00-C-368-C, petitioner submitted an original complaint and several copies of the complaint for service on the respondents. Shortly thereafter, in response to a memorandum from this court advising petitioner of various aspects of the 1995 Prison Litigation Reform Act, petitioner requested permission to dismiss the case voluntarily to allow him to exhaust his administrative remedies as required by 42 U.S.C. § 1997e. The request was granted.

Petitioner's earlier case was dismissed before he incurred a filing fee. He is not prejudiced by proceeding with his lawsuit under this new case number. Indeed, the case must proceed as a new case now that petitioner has exhausted his administrative remedies. See *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999) (Prison Litigation Reform Act requires prisoners to exhaust administrative remedies *before* bringing lawsuit). Nevertheless, because petitioner filed several copies of his complaint in case number 00-C-368-C, the record of that case will not be altered if I allow petitioner to use one of the extra copies of his complaint as the operative pleading in this case. Therefore, I have removed a copy of the complaint petitioner filed in case no. 00-C-368-C from the file in that case and am considering it as the complaint in this case. As to petitioner's motion to appoint counsel, because I am denying petitioner's request for leave to proceed on all of his claims, I will deny his motion to appoint counsel as moot.

In his complaint, petitioner makes the following allegations of fact.

## ALLEGATIONS OF FACT

Petitioner Brian T. Thomas is an inmate at Waupun Correctional Institution in Waupun, Wisconsin. Respondent Captain Strahota is a security supervisor. Respondent Lieutenant Rloehn is a security director. Respondent R. Hable is a security supervisor and an adjustment hearing officer. Gary McCaughtry is the warden at Waupun Correctional Institution.

On April 3, 1997, respondent Strahota questioned petitioner about a report by Officer Schaeffer that petitioner and inmate Tim Harrison had engaged in sexual conduct while showering on March 31, 1997. Petitioner denied any sexual conduct. Strahota then asked petitioner whether he had ever been attracted to or involved with another male. Petitioner answered affirmatively and stated also that prior to his imprisonment, he had been in a bisexual relationship for four years past but that he was not presently "indulg[ing] in said behavior . . . due to [his] H.I.V. status, the prison rules, and environment." Strahota ordered petitioner to be escorted to temporary lockup in "adjustment confinement" while the matter was being investigated. The same day, Strahota questioned inmate Harrison, whom Strahota referred to as petitioner's "uninfected white comrade." Inmate Harrison was not detained in temporary lockup in "adjustment confinement" like petitioner, who is black and H.I.V. positive. Instead, he was put in temporary lockup in the North Program Cell Hall. Petitioner stayed in temporary lockup for 21 days before he was given a disciplinary hearing. During that period, petitioner asked for equal treatment several times. While in temporary lockup, petitioner was not allowed telephone calls, his personal property or visits and he was isolated from the general population.

On April 14, 1997, 11 days after petitioner and inmate Harrison were questioned, petitioner was given a conduct report written by respondent Strahota charging him with violation of Wis.Admin.Code § DOC 303.15 "sexual conduct." The report stated that both petitioner and inmate Harrison had acknowledged that petitioner entered inmate Harrison's shower stall and washed Harrison's back with a soapy towel. Petitioner denies that he acknowledged any wrongdoing. Respondent Rloehn, security director, did not review petitioner's placement in temporary lockup properly. On April 20, 1997, petitioner wrote his own statement of the facts concerning the incident to contradict the allegations in the conduct report. In petitioner's statement, he admitted that he had washed inmate Harrison's back but denied that he was in the same shower stall as inmate Harrison. Petitioner argued that there was no preponderance of the evidence to establish guilt of the alleged violation or attempted violation.

On April 24, 1997, a disciplinary hearing took place before William Schultz and respondent Captain Hable. At the hearing, petitioner gave a verbal rendition of his version of the facts that he had submitted in writing four days earlier. According to the notations on the disciplinary hearing forms under the heading, "Offender Statement," petitioner said that he was "not guilty," that he was naked, that he washed Harrison's back and that "there was nothing sexual intended." Petitioner's request to question an eye witness as well as his accuser was denied. The committee asked Strahota whether the conduct report was accurate. Strahota answered that it was. Inmate Harrison denied that petitioner and he were in the same open module shower stall or that petitioner washed his body. Petitioner's hearing advocate, Kathy Porter, was present but did not address issues petitioner believed to be crucial to the hearing outcome.

The hearing committee found petitioner guilty of engaging in or attempting to engage in sexual conduct. The committee report states that although petitioner denied that he was guilty, he admitted at the hearing that "there were three other inmates in the shower," that "[he] was naked," that "there was nothing sexual intended" and that "[he] didn't tell Capt. Strahota anything else." The committee report states as its "reason for decision" the following:

> We find the witness not credible states [sic] inmate Thomas did not wash back while Thomas stated he did. We find Capt Strahota credible in his report of the incident. Inmate knowingly was in a shower stall with another inmate. Inmate admitted to washing the other inmates back.

Petitioner believes these factual findings are fabricated. These statements do not appear in petitioner's statement of the facts entered into the record on April 20, 1997, and petitioner states he did not make them at the hearing itself. The committee report incorporates the facts stated in the conduct report. The hearing record does not acknowledge petitioner's documentary testimony of April 20, 1997. Petitioner's penalty for violating the rules was three days' adjustment segregation and 90 days' program segregation. After petitioner was found guilty, he was removed from his food service position.

Petitioner appealed the committee decision to the warden, respondent McCaughtry. Petitioner asserted that the factual findings were false and unsupported by the evidence. On May 9, 1997, McCaughtry affirmed the adverse findings, remanding the matter back to the adjustment committee "to address reasons for decision in record." On remand, the committee incorporated more language from the conduct report

in its May 22, 1997 report. The committee report notes as the "reason for decision" that

> [a]fter review of the C.R., the inmate's statement, witness testimony and the evidence, we find he intentionally attempted to have sexual contact with another inmate while they were taking a shower. Both inmates were unclothed, in the same shower stall, and inmate Thomas did admit to washing inmate Harrison's back. Because of the prison setting and being an all male institution this type of behavior is not permitted.

On remand, petitioner's penalty remained three days' adjustment confinement and 90 days' program segregation.

## DISCUSSION

Petitioner alleges that respondents violated his equal protection and due process rights under the Fourteenth Amendment, the Americans with Disabilities Act and various state laws.

### A. Equal Protection

I understand petitioner to allege that his equal protection rights under the Fourteenth Amendment on the basis of his race, sexual orientation and H.I.V. positive status were violated by respondents Strahota and Rloehn in the temporary lockup context and by respondents Hable and McCaughtry in the disciplinary hearing context.

The equal protection clause of the Fifth Amendment prohibits state actors from applying different legal standards to similarly situated individuals because of their membership in a

suspect class or "definable minority" or because of the exercise of a fundamental right. See *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996); see also *Smith on behalf of Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997). If a petitioner demonstrates he has been treated differently from similarly situated persons because of his membership in a suspect class or the exercise of a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. See *Nabozny*, 92 F.3d at 454. However, "when reviewing class distinctions drawn in social legislation not pertaining to a fundamental right or a suspect class, '[a court's] review is limited to determining whether the statute is rationally related to legitimate legislative goals.'" *Hassan v. Wright*, 45 F. 3d 1063, 1068 (7th Cir. 1995) (quoting *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 132 (7th Cir. 1989)).

1. Race

The equal protection clause does not prohibit governmental actors from making distinctions between individuals on the basis of race in all instances. It does provide, however, that all racial classifications imposed by federal, state or local governmental actors are subject to the strict scrutiny of a reviewing court. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2113 (1995) (plurality opinion). Pursuant to this strict scrutiny, racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. See *id.*

Petitioner alleges that respondents Strahota and Rloehn violated his equal protection rights by placing him in temporary lock up on the basis of his race. In support of his contention, petitioner, who is black, states that he was placed in "adjustment confinement" temporary lock up but inmate Harrison, who is white, was placed in temporary lock up in

North Program Cell Hall for their roles in the same incident. To bolster his allegation that he was treated differently on the basis of his race, petitioner states that respondent Strahota referred to inmate Harrison as petitioner's "uninfected white comrade."

Petitioner fails to state a claim upon which relief may be granted. On the basis of the alleged facts, petitioner's own allegations show that respondents' act was narrowly tailored to further a compelling state interest. At the time respondents began to investigate the March 31, 1997 incident, they placed both petitioner and inmate Harrison in lockup status. Although petitioner was placed in a cell that was in a different area from inmate Harrison's cell, both were segregated from the general population. Prison officials have a legitimate interest in separating inmates from the general population during disciplinary investigations so that they do not inhibit the investigation. See Wis. Admin. Code § DOC 303.11(4). There is no requirement that inmates involved in a particular incident be placed in segregated status at the same location. The fact that petitioner was ultimately found guilty of the conduct under investigation reinforces the conclusion that placing petitioner in temporary lockup was a narrowly tailored measure that furthered a compelling state interest.

Petitioner alleges also that respondents Hable and McCaughtry discriminated against him on the basis of his race during the disciplinary hearing. However, petitioner's bald assertion is unsupported by any factual allegations. Petitioner does not state any facts that suggest that respondents Hable and McCaughtry treated him differently from other similarly situated persons because of his race. Instead, it appears that petitioner is taking issue with the finding of guilt itself. Although petitioner believes that the finding of guilt is unwarranted, this court is not the proper forum for such a

complaint. Petitioner's dissatisfaction with the outcome of the disciplinary hearing does not implicate an equal protection violation absent any supporting factual evidence. Accordingly, petitioner will be denied leave to proceed on his equal protection claim on the basis of his race.

2. Disability and sexual orientation

Although the disabled are protected under statutory enactments such as the Americans with Disabilities Act, they do not constitute a suspect class for the purpose of equal protection analysis. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-446 (1985); *Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999); *Hansen v. Rimel*, 104 F.3d 189, 190 n.3 (8th Cir. 1997); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996); *Vaughn v. Sullivan*, 906 F. Supp. 466, 475 (S.D. Ind. 1996), aff'd, 83 F.3d 907 (7th Cir. 1996). Similarly, homosexuals and, by extension, bisexuals are not considered a suspect or quasi-suspect class entitled to more than rational basis scrutiny for equal protection purposes. See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Therefore, petitioner's equal protection claim as it applies to his H.I.V. positive status and bisexuality must be evaluated under the rational basis test. Under this test, a court presumes that the governmental action is valid and confirms it if it is rationally related to a legitimate state interest. See *Pryor v. Brennan*, 914 F.2d 921, 923 (7th Cir. 1990); *City of Cleburne*, 473 U.S. at 446. This deferential review is limited to a determination that 1) the governmental actors have a legitimate purpose for distinguishing among the individuals affected and 2) the means effecting that purpose have a rational relation to the asserted purpose and are not wholly arbitrary. See *Steffan v. Aspin*, 8 F.3d 57, 63 (D.C. Cir. 1993) (citing *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982)).

Petitioner bases his disability and sexual orientation discrimination claims on the same set of facts upon which he bases his race discrimination claim. Because respondents' treatment of petitioner during the temporary lockup and during the disciplinary hearing withstands the higher standard of strict scrutiny in the context of race discrimination, it must also pass the less stringent rational basis scrutiny in the context of disability and sexual orientation discrimination. Accordingly, I need not address whether respondents' acts have a rational relation to a legitimate state interest. I will deny petitioner's equal protection claim as it relates to his H.I.V. positive status and his bisexuality.

B. Due Process

Petitioner alleges that respondents Strahota and Rloehn violated his due process rights by placing him in temporary lockup for 21 days without a hearing and that respondents Hable and McCaughtry violated his due process rights by not allowing him to cross-examine his accusers or to present documentary evidence supporting his contentions.

Petitioner fails to state a claim upon which relief may be granted because he does not establish that he was deprived of a protectible liberty interest. A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. See *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). In *Sandin v. Conner*, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After *Sandin*, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such

credit affects the duration of an inmate's sentence. See *Warner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, *Sandin* does not allow suit complaining about deprivation of liberty).

The fact that petitioner was held in temporary lockup for 21 days without a hearing does not implicate a liberty interest. Wisconsin prisoners have no liberty interest in remaining free from temporary lockup. See *Russ v. Young*, 895 F.2d 1149, 1154 (7th Cir. 1989) (holding that being placed in temporary lockup does not implicate liberty interest). Therefore, petitioner has no federally enforceable right to due process before being held in such detention. Under *Sandin*, this restraint does not impose an "atypical and significant hardship" on petitioner even though his confinement in temporary lockup prior to a hearing may not have been properly reviewed and even though he was not allowed personal possessions or visits during the lockup. Petitioner does not allege that he was held in disciplinary segregation for a period that exceeded the remaining term of his incarceration. Petitioner will be denied leave to proceed on his due process claim against respondents Strahota and Rloehn.

Similarly, the fact that respondents Hable and McCaughtry did not allow petitioner to cross-examine his accusers or to present documentary evidence supporting his contentions does not implicate a liberty interest. Petitioner's penalty for violating the rules was three days' adjustment segregation and 90 days' program segregation. Under *Sandin*, this disciplinary status is not atypical or a significant hardship in relation to the ordinary incidents of prison life. Petitioner will be denied leave to proceed on his due process claim against respondents Hable and McCaughtry.

C. Americans with Disabilities Act

Petitioner alleges that respondents Hable and McCaughtry violated the Americans with Disabilities Act by removing him from his food service position after disciplining him on the basis of a conduct report that discriminated against him because of his H.I.V. positive status.

The Supreme Court has held that the Americans with Disabilities Act applies to state prisons. See *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). However, claims brought in federal court against state officials or state agencies by private individuals for money damages under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 - 12213, are barred by the Eleventh Amendment. See *Board of Trustee of University of Alabama v. Garrett*, 2001 WL 167628 (U.S. Feb. 21, 2001); *Stevens v. Illinois Dept. of Transportation*, 210 F.3d 732 (7th Cir. 2000); *Erickson v. Board of Governors of State Colleges and Universities*, 207 F.3d 945 (7th Cir. 2000).

In *Garrett*, 2001 WL 167628, the Supreme Court held that Congress overstepped the bounds of the Fourteenth Amendment by allowing individuals to sue states to recover money damages under the ADA in federal court. In *Erickson*, 207 F.3d at 952, the Seventh Circuit held that because the ADA does not enforce the Fourteenth Amendment, "the Eleventh Amendment and associated principles of sovereign immunity block private litigation against states in federal court" under the act. In *Stevens*, 210 F.3d at 741, the court reiterated that "[s]tates are entitled to Eleventh Amendment immunity for suits brought by individuals under the ADA" in federal court. To the extent plaintiff is attempting to sue defendants under the ADA in their official capacities, that claim is barred by the Supreme Court's holding in *Garrett*. Similarly, plaintiff cannot

bring a claim under the ADA against any of the individual defendants because the Seventh Circuit has held that "individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA." *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995). Accordingly, I will deny petitioner leave to proceed on his claim under the ADA.

D. State Law Claims

Inasmuch as respondents may have violated Wisconsin Admin. Code Ch. DOC by allegedly not following proper procedure during the course of petitioner's disciplinary investigation and proceeding, petitioner's claims are based on state law. The Court of Appeals for the Seventh Circuit has recognized that "a district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims." *Groce v. Eli Lilly Co.*, 193 F.3d 496, 500 (7th Cir. 1999). Because petitioner has not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over petitioner's state law claims. See 28 U.S.C. § 1367(c)(3).

E. Motion to Appoint Counsel

Plaintiff also requests that the court appoint counsel to represent him in this matter. Because I will deny petitioner leave to proceed on all of his claims, I will deny his motion to appoint counsel as moot.

ORDER

IT IS ORDERED that

1. Petitioner Brian T. Thomas's request for leave to proceed *in forma pauperis* on his equal protection, due process,

Americans with Disabilities Act claim and state law claims is DENIED and the action is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. Petitioner's motion to appoint counsel is DENIED as moot;

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because the state law claims do not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g);

4. The unpaid balance of petitioner's filing fee is $136.96; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

5. The clerk of court is directed to close the file.

Entered this 21st day of February, 2001.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

| | | |
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| BRIAN T. THOMAS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| V. | ) | ORDER |
| | ) | |
| DEPARTMENT OF CORRECTIONS PRISON OFFICERS; ADMINISTRATION — CAPT. STRAHOTA, LT. RLOEHN, CAPT. R. HABLE; and GARY R. McCAUGHTRY, Warden at all relevant times, | ) | 01-C-38-C |
| | ) | |
| Respondents. | ) | |

Judgment was entered in this case on February 22, 2001 denying petitioner leave to proceed *in forma pauperis* and dismissing the action for petitioner's failure to state a claim upon which relief may be granted. Now petitioner has filed a notice of appeal. Because the notice is not accompanied by the $105 fee for filing his appeal, I construe petitioner's notice to include a request for leave to proceed on appeal *in forma pauperis*.

Petitioner's request for leave to proceed *in forma pauperis* on appeal is governed by the 1996 Prison Litigation Reform Act. This means that this court must determine first whether petitioner's request must be denied either because he has three strikes against him under 28 U.S.C. § 1915(g) or because the

appeal is not taken in good faith. Petitioner does not have three strikes against him, and I do not intend to certify that his appeal is not taken in good faith.

The only other hurdle to petitioner's proceeding with his appeal *in forma pauperis* is the requirement that he pay an initial partial payment of the $105 for filing his appeal. From petitioner's trust fund account statement, I calculate that he owes $13.04 as an initial partial payment. Petitioner must pay the remainder of the fee in monthly installments pursuant to 28 U.S.C. § 1915(b)(2) until it is paid in full. If, by April 16, 2001, petitioner fails to submit the required initial partial payment or show cause for his failure to do so, then I will advise the court of appeals of that fact so that it may take whatever action is necessary with respect to petitioner's appeal.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed *in forma pauperis* on appeal is GRANTED. Petitioner may have until April 16, 2001, in which to submit a check or money order made payable to the clerk of court in the amount of $13.04 as his initial partial payment of the $105 fee for filing his appeal. The remainder of the fee must be paid in monthly installments pursuant to 28 U.S.C. § 1915(b)(2).

Further, IT IS ORDERED that if, by April 16, 2001, petitioner fails to submit the required initial partial payment or show cause for his failure to do so, then I will advise the court

of appeals of that fact so that it may take whatever action is necessary with respect to petitioner's appeal.

Entered this 26th day of March, 2001.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge